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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 607

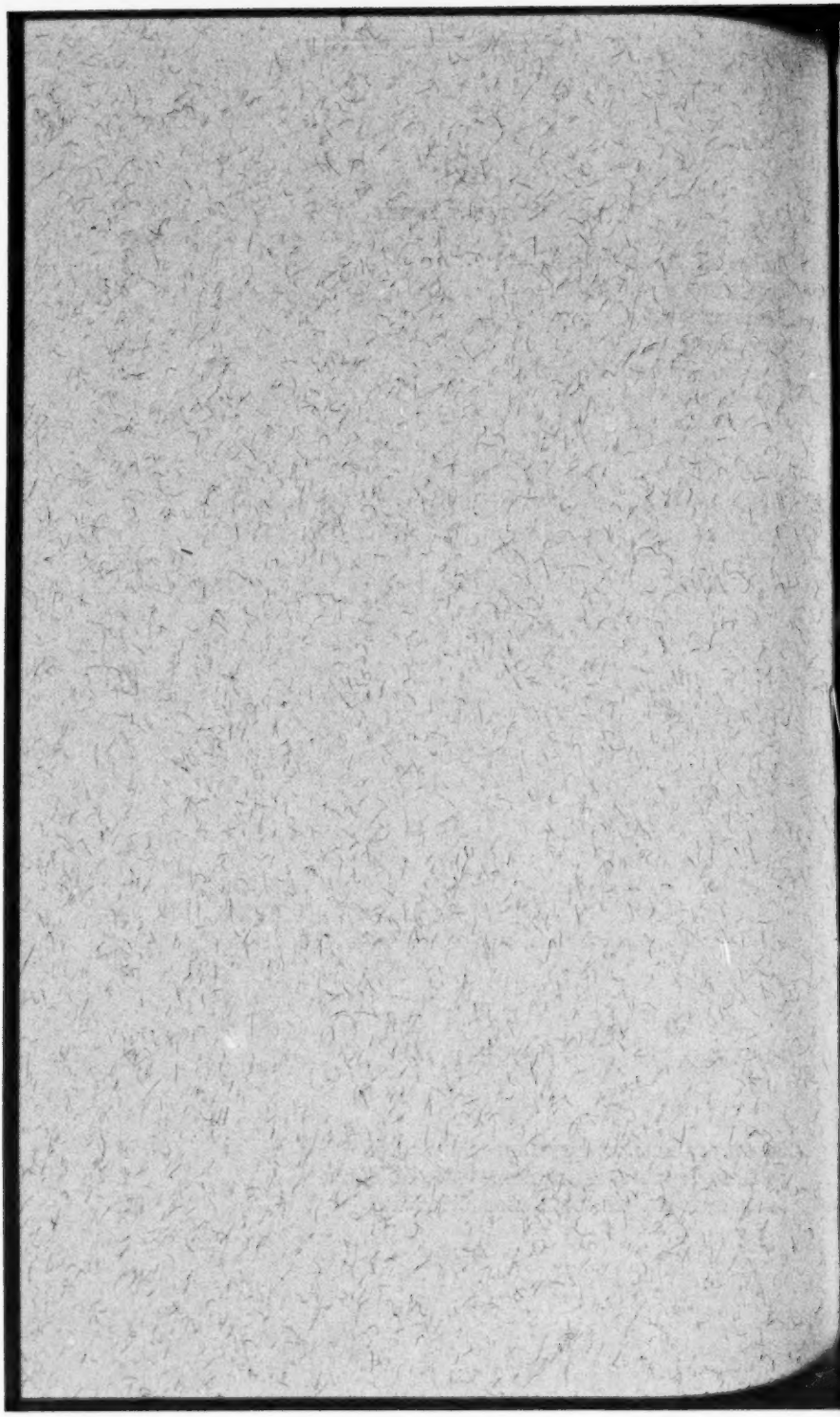
HARLAN GRIMES,
Petitioner,

v.

EDWIN T. MAYNARD, ET AL,
Respondents

RESPONDENTS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

FRANK JENNINGS,
P. O. Box 777,
Graham, Texas,
TOM M. MILLER,
P. O. Box 308,
Graham, Texas,
TOD R. ADAMS,
P. O. Box 459,
Crockett, Texas,
Attorneys for Respondents.



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To the Honorable Supreme Court of the United States:

Comes now, Betty V. Maynard, individually and as Executrix of the Estate of E. T. Maynard, deceased, E. W. Robitaille, Administrator with the will Annexed of the Last Will and Testament of A. G. Talbot, deceased, A. G. Talbot, Jr., Helen Talbot Clark, Grover C. Clark, Elizabeth Talbot Hunt, Robert A. Hunt, Earle P. Adams, Walter B. Morgan and B. W. King, Respondents in the above styled and numbered cause, and files this their Reply Brief to the Application of Petitioner, Harlan Grimes, for a writ of Certiorari to the Court of Civil Appeals for the Tenth Judicial District of Texas at Waco, which affirmed the judgment of the District Court of Houston County,

Texas, under an opinion reported in Vol. 270, S. W. 2d, pages 282, et seq.

Questions Presented

(1) Is a Federal question in a suit to set aside two prior judgments timely raised, or does it come too late, where the petitioner, in three prior suits, all fully heard and adjudicated in the state courts, had an opportunity to raise such Federal question and failed to do so in each of said three prior suits?

(2) When parties have been fully heard in the regular course of judicial proceedings in the State Courts, does an erroneous decision in such proceedings deny a party of due process of law, within the meaning of the 14th Amendment of the Constitution of the United States, when such question was not raised in such proceedings?

(3) In any proceedings brought in the State courts of Texas, to vacate and set aside a judgment, is it necessary to join all parties to such judgment, under the laws of the State of Texas?

(4) Are such proceedings to vacate and set aside a judgment, where not all parties to such judgment are made parties, a collateral attack, under the laws of the State of Texas?

(5) Where a party has had full opportunity to litigate all issues, including any Federal question, in three prior litigations, are the judgments rendered in such three prior suits res adjudicata in a subsequent suit?

Statement of the Case

In lieu of Petitioner's "Statement of Material Facts" (Page 4-16, Petitioner's Application), Respondents respectfully submit the following statement:

The present suit was originally brought in the District Court of Houston County, Texas by Petitioner to set aside

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and cancel two prior judgments of said trial court. The first judgment attacked was Harlan Grimes, et al. vs. A. G. Talbot, et al., No. 7773 in the trial court, which judgment was affirmed by the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston July 27, 1950, in cause No. 12,195 on the docket of that Court and reported in 233 S. W. 2d 206, and The Supreme Court of Texas refused Writ of Error, N. R. E. This judgment was rendered on the pleadings, the trial court sustaining defendants' (Respondents' herein) Special Exceptions to the pleading of the Petitioner herein and his brother, Russell W. Grimes, who was his co-plaintiff in cause No. 7773, but is not a party to the present suit. There was no allegation of fraud in Cause No. 7773 and the suit was merely for the cancellation of a recorded assignment of one-half interest in certain lease-holds in Houston County, Texas. The Court of Civil Appeals held that "in the absence of any allegations of fraud" the question of whether petitioner and his brother were entitled to a cancellation "in any event" was not presented. The Court then held that title to the half interest in the leaseholds passed with the delivery of the assignment to the privities of the respondents herein, and that the condition in the assignment "if a condition it is" was a condition subsequent. (See Exhibit "I", pp. 85-92, Petitioner's Application)

The second judgment attacked by Petitioner's Application, is *Edwin T. Maynard et al* vs. *Harlan Grimes* and *Russell W. Grimes,* No. 7997 in the District Court of Houston County, Texas, wherein respondents herein and their privities brought suit for an accounting and a receivership of the leaseholds, and an agreed judgment was rendered March 22, 1951, adjudicating the interests of the parties thereto in accordance with the judgment rend-

ered in Cause No. 7773, and giving the management and control of the leaseholds to Respondent, E. W. Robitaille.

A third suit in this series (not mentioned by Petitioner in his application) was *E. W. Robitaille* vs. *Harlan Grimes*, No. 8053 in the District Court of Houston County, Texas wherein E. W. Robitaille, respondent herein, recovered judgment against Petitioner herein based on the judgment in Cause No. 7997 for one-fourth of the expenses of operating the leaseholds from April 1, 1951, to and including August 31, 1952, and attorney's fees. This judgment was affirmed by the Court of Civil Appeals for the First Supreme Judicial District at Galveston in an opinion reported in 257 S. W. 2d 359, and the Supreme Court of Texas refused writ of error, n. r. e. (See the opinion of Court of Civil Appeals for Tenth Supreme Judicial District of Texas, R.), The Judgment in this last cited case (No. 8053—257 S. W. 359) is not here attacked in the present suit, and in that suit (No. 8053—257 S. W. 2d 359) no attack was made on the two first judgments as is here made in petitioner's present suit, although Petitioner might have then and there raised his federal question.

The respondent's contentions as shown by his Petition and Supplemental Petition (R-35) as well as by his Application herein is that the judgment in Cause No. 7773 and No. 7997 were obtained by the fraudulent conduct of Respondents in that the Respondents Earle P. Adams, B. W. King and Walter B. Morgan, attorneys for the other respondents in said two first suits, and the other respondents by and through their said attorneys, presented arguments to the Courts that were opposed to Applicant's arguments and contentions, all of which were known to Petitioner prior to or during such litigations and that the trial court and appellate courts committed fraud on the

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Petitioner by agreeing with said arguments and deciding against applicant and his contentions. In addition thereto, Petitioner alleged (R. 30-35) that prior to the judgment in Cause No. 7997, Petitioner was prevented from taking the deposition of E. T. Maynard, by allegedly false representations of Respondents, the falsity of which Petitioner learned after judgment in 7997 but in view of the final decision of Cause No. 7773, the testimony sought to be adduced by such deposition, even if it could have been obtained, which is denied, would not have been admissable in the trial of Cause No. 7997.

Argument

Petitioner in the present suit here seeks to re-litigate the issues raised or which could have been raised in three prior suits, all tried and determined in the District Court of Houston County, Texas. The judgment in the first case (No. 7773 in the District Court) was affirmed by the Court of Civil Appeals at Galveston, 233 S. W. 2d 206; The Supreme Court of Texas refused Writ of Error, N. R. E. The second suit was Cause No. 7997 in which an agreed judgment was rendered. The third suit was No. 8053 in the District Court, which was affirmed by the Court of Civil Appeals at Galveston. 257 S. W. 2d 359. The Supreme Court of Texas refused Writ of Error, N. R. E. In none of these cases, did petitioner seek to raise any federal question, nor any question of fraud.

Petitioner invokes the jurisdiction of this Court in his application under Section 1257, Subsection 3, of Title 28, United States Code. (Petitioner's Application p. 2) This Section was derived from 39 *Statutes at Large* 726, chap. 448, enacted September 6, 1916. In construing the statute, in *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, 63 L Ed. 722 this Court used the following language, which

we submit is applicable and controlling in the construction of Section 1257:

> "The jurisdiction of this Court to review the final judgment or decree of the highest court of a state, in such a case as we have here, is defined in #237 of the Judicial Code (36 Stat. at L. 1157, chap. 231), as amended September 6th, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. 1916, #1214), which provides that it shall be competent for this court, by certiorari, to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege, or immunity under the Constitution of the United States and 'the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution.' It is settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice . . . and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right.' *Atlantic Coast Line R. Co.* v. *Mims,* 242 U. S. 532, 535, 61 L. Ed. 476, 478, 37 Sup. Ct. Rep. 188; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 371, 61 L. ed. 367, 370, 37 Sup. Ct. Rep. 165, and cases cited."

The rule, as above stated, is supported also by *Meredith* v. *Winter Haven,* 320 U. S. 288, 88 L. Ed. 9, 64 S. Ct. 7; *Godchaux Co.* vs. *Estopinal,* 64 L. Ed. 312, 251 U. S. 179, 40 S. Ct. 116; *Missouri, K & T R. Co.* v. *Sealy,* 248 U. S. 363,

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63 L. Ed. 296; *Missouri P. R. Co.* v. *Taber,* 244 U. S. 200, 61 L. Ed. 1082; *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709.

Bonner v. *Gorman,* supra, on the facts, is most especially in point. In that case, as here, there were successive suits that went to final judgment in the state courts without any federal question being raised. In the trial on the Merits of the third suit (which was then before the Court), the petitioner raised for the first time a federal question by alleging that the petitioner was being deprived of his property without due process of law because the original judgment was null and void, and all other judgments based upon it were void also. In overruling petitioner's contention in that case, the Court used the following language:

> "It is firmly established that, when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States (*Central Land Co.* v. *Laidley,* 159 U. S. 112, 40 L. Ed. 94, 16 S. Ct. 80), and that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late."

Further, it is well settled, that unless a federal question was necessary to the judgment of the state Court, or in fact was made the ground of it, this court is without jurisdiction to review it. *Bonner* v. *Gorman,* supra, and cases there cited. Stated another way, a review by this Court is precluded if the decision of the state court is upon a non-Federal ground or a point of local or general law sufficient to support the judgment. 54 *American Jurisprudence* 802; *Id,* 826, and cases there cited.

In the case at bar, the decision of the Court of Civil Appeals for the Tenth Judicial District was based on two grounds: (1) One of the parties (Russell W. Grimes) whose interest was adjudicated in both Causes Nos. 7773 and 7997, was a necessary party to the present suit to set aside those judgments and since he was not a party, the attack on those two judgments was collateral in nature and not permissible; and (2) The facts alleged by Petitioner in his pleadings were fully adjudicated in the prior litigations mentioned in the foregoing statement of the case.

These two rules of general law were the basis of the judgment of the Texas court of civil appeals. The first rule is supported not only by the cases cited by the learned Waco court, but also by *Pure Oil Company* vs. *Reece*, 124 Texas 476, 78 S. W. 2d 932, *Hartel* v. *Dishman*, 135 Tex. 600, 145 S. W. 2d 865, 870. The last cited case succinctly states the rule as follows:

> "The rule is well settled in this State that where a proceeding is instituted to vacate and set aside a judgment, the parties to the judgment must be made parties to such proceedings, and unless that is done the attack is necessarily a collateral one. (Citing many authorities)."

The second rule is not only supported by the authorities cited by the excellent opinion of the Waco Court, but also by one of the authorities cited to this Court by Petitioner. *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U. S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215, 1221, wherein this Court stated:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had

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an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. Ed. 355, 376, 18 S. Ct. Rep. 18; Greenl. Ev. ## 522, 523."

See also *30 American Jurisprudence* 910, #165, and the authorities there stated.

It is conceded that in both of the cases cited by Petitioner *Postal Telegraph Cable Co.* v. *City of New Port,* supra, and *Hansberry* v. *Lee,* 61 S. Ct. 115, 311 U. S. 32, 85 L. Ed. 22, this Court held in perfectly reasoned opinions that the application by the state courts of the rule of res adjudicata resulted in a denial of due process to one of the litigants. In both of those cases, however, the litigant so wronged was *not* a party to the prior suit. Obviously such facts clearly distinguish these cases from the case at bar. Similarly Petitioner has cited many cases supporting eminently correct rules of law, but the facts in each of such cases are in no way analogous to the facts in the case at bar, and such cases and rules do not apply to, much less control, the case now before this honorable Court.

It appears that the main burden of Petitioner's argument is stated in his "Statement of Material Facts" at page 6 of his application that in the original suit, No. 7773 in the District Court of Houston County, No. 12,195 in the Court of Civil Appeals at Galveston (233 S. W. 2d 206), the latter court found "practically all the facts and all the law" in favor of Petitioner and his brother, Russell W. Grimes, affirmed the established law of Texas and then in the same decision, overruled the established law. The only case cited in the opinion of the Galveston court was *Manton* v. *City of San Antonio,* 207 S. W. 951, which Petitioner cites many times in his application herein as supporting his contention. Petitioner concedes in effect

at page 25 of his Application that if the allegedly erroneous opinion of the Galveston court did not result in an erroneous disposition of that case, then his Application is without merit. (This, notwithstanding the holding of *Bonner* v. *Gorman,* supra, quoted above).

We submit that *Manton* v. *City of San Antonio,* supra, fully supports the decision of the Galveston court. In that case, the instrument under consideration was a deed which contained in the deed itself the following provision:

> "This deed is given, however, subject to the condition that Obraje or Travis street, between North Flores street and Main avenue, will be widened within two years from the date hereon; otherwise the title to revert to the grantor herein."

The deed was delivered to an agent of the grantee for deposit in escrow with a bank and was so deposited in escrow. The court found that a consideration, other than the widening of the street had been given in consideration of the deed and that there was a substantial performance of the condition. The court stated:

> "There is no exception to the rule that a deed cannot be delivered to the grantee as an escrow, but if delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself.
>
> * * * * *
>
> "If there had been no delivery of the deed to the bank to be held as an escrow, the law as to condition subsequent would undoubtedly be applicable, and a substantial compliance with the terms of the condition would satisfy the law and prevent a forfeiture of the title. * * *

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> " • • • where there have been other considerations performed, • • • the condition will not be considered a condition precedent, but will have applied to it the rules applicable to conditions subsequent."

The Court then held that, even though the deed contained the condition quoted in the deed itself and even though the deed was properly escrowed with the bank, that because there were "other considerations performed", the condition would be treated as a condition subsequent, which was satisfied by substantial performance.

The Galveston court, in the opinion of which Petitioner complains, found that the Appellants' (Petitioner herein and his brother) pleadings showed: that "There is nothing in the language of the assignment which in and of itself should show that the completion of the fourth well was made a condition precedent to the vitality of the assignment;" that "there is nothing in the contract to show any intention that title should not pass upon the delivery of the assignment out of escrow;" that Appellants' protection to prevent the passing of title until the completion of the fourth well was the escrow (in other words, the completion of the fourth well was a condition precedent to DELIVERY of the assignment); that Appellants in a letter plead by them, authorized the escrow agent to make delivery; and that "the delivery was a lawful one and appellants do not here claim otherwise;" that Appellees (Respondents herein and their privities) had performed a substantial compliance with the condition although "the fourth well lacked something of completion;" that the consideration performed by Appellees was not only the "completion" of the fourth well but the drilling, equiping and completion of the first three wells and also the "drilling" of the fourth well into the Woodbine sand.

The Galveston court held in effect that, since considerations other than the "completion" of the fourth well were performed, under *Manton* v. *City of San Antonio,* the condition (in the assignment) "if it is a condition" (not being expressly in the assignment) must be held to be a condition subsequent; and secondly that the condition precedent in the contract was a condition precedent to *delivery* of the assignment and waived when Appellant authorized delivery, and took in satisfaction of the condition of the condition the promise of Appellees to complete the fourth well. Either of these holdings will support the judgment, and both of them directly and precisely follow *Manton* v. *City of San Antonio.*

We further respectfully urge that Petitioner's application should be denied and refused for the reason that "the asserted Federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous." 54 *Am. Juris.* 825, #191, n. 6, and authorities there cited.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Court deny Petitioner's application for a Writ of Certiorari to the Court of Civil Appeals for the Tenth Judicial District of Texas at Waco.

TOM M. MILLER,
P. O. Box 308,
Graham, Texas,
FRANK JENNINGS,
P. O. Box 777,
Graham, Texas,
TOD R. ADAMS,
P. O. Box 459,
Crockett, Texas.

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